Looking for Legislation

Examining the "Free" in Free Public Services Doctrine

By Jonathan M. Bernstein and Aaron J. Aisen

Even as the courts have consistently held that a municipality cannot claim recovery, they have also consistently held that the remedy does not rest with the courts.

Municipalities provide emergency services to taxpayers using tax dollars. However, in the event of a large disaster, these services can quickly empty the coffers. This potentially limits the capacity to respond to future calls by creating additional budgetary problems and causing significant headaches for municipal leaders. Municipal leaders are probably justified in asking for reimbursement, especially when a private party's negligence causes the disaster. When a private party voluntarily reimburses the community for those expenses, the municipality is grateful.

However, a municipality has extremely limited ability to recover those costs through litigation. Erie County, New York, recently found this out when it attempted to sue to recover costs associated with the response to and cleanup of an airplane crash. *County of Erie, New York v. Colgan Air, Inc., et al.* 2013 U.S. App. Lexis 4474 (2nd Cir. 2013). Lest other municipalities believe that they are in a better position than Erie County, the recent Second Circuit decision in this case is very similar to the holdings in other jurisdictions. Case law shows that municipalities may be in the best position to fix their own problems.

Facts of Colgan Air

On the evening of February 12, 2009, Continental Flight 3407, operated by Colgan Air, crashed in Clarence Center, New York, killing all on board and one on the ground. In addition to destroying a private home, it also caused "substantial damage to neighboring properties, including serious environmental clean-up expenses and damages" 2013 U.S. App. Lexis 4474, at *3 (internal quotations omitted). Erie County sued Colgan Air in a federal court to recover the funds that it spent on the cleanup. The county's amended complaint asserted that

> Erie County was required to expend resources in excess of the normal provisions of police, fire, and emergency services as a result of crash 7407. Specifically, [the county] was forced to expend unprecedented monetary resources in order to provide public services including: Overtime pay for police and

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emergency personnel; the clean-up and removal of human remains; the clean-up and removal of chemical substances originating from the [a]ircraft[;] the clean-up and removal of the [a]ircraft itself; the provision of emergency and counseling services to the surviving members of the decedents' families; and the purchase, lease or rent of equipment necessary to respond to the crash of Flight 3407.

Id. at *4.

The U.S. District Court of the Western District of New York granted Colgan Air's motion to dismiss because under New York state law " 'public expenditures made in the performance of governmental functions are not recoverable.'" *County of Erie v. Colgan Air, Inc.*, 2012 U.S. Dist. Lexis 41254, at *5 (W.D.N.Y. Mar. 25, 2012) (quoting *Koch v. Consolidated Edison Co. of N.Y.*, 62 N.Y.2d 548, 560 (N.Y.1984)).

In *Koch*, 62 N.Y.2d 548, 560 (N.Y.1984), Con Edison's negligence caused a 25-hour citywide blackout in New York City. New York City tried to recoup what it spent responding to the blackout. However, the New York Court of Appeals, the state's highest court, foreclosed the possibility in that case and stated that the general rule was "grounded in considerations of public policy." *Koch*, 62 N.Y.2d at 560–61.

Holding of Colgan Air

To understand the U.S. district court and Second Circuit decisions, some of Erie County's arguments must be examined. Erie County's arguments relied on rules and statutes that are at least similar to those of other jurisdictions. The county relied on the common law doctrine called the "fireman's rule" and a theory of statutory nuisance as possible means of recovery.

First, the fireman's rule "'precludes firefighters and police officers from recovering damages for injuries caused by negligence in the very situations that create the occasion for their services…where the injury sustained is related to the particular dangers which [they] are expected to assume as part of their duties.'" *County of Erie*, 2013 U.S. App. Lexis 4474, at n.3 (quoting *Zanghi v. Niagara Frontier Transp. Comm'n*, 85 N.Y.2d 423, 438–39 (N.Y. 1995)). However, the New York State Legislature overruled the "fireman's rule" with General Obligations Law §11-106, which allows "police officers or firefighters injured in the line of duty to recover damages from the person or entity whose negligence caused the injury." *County of Erie*, 2013 U.S. App. Lexis 4474, at *10–11.

Erie County argued that in substance this change in the fireman's rule meant that "New York has implicitly abandoned the free public services doctrine." *Id.* at *9. After all, if a police officer or fireman could sue when responding to an otherwise taxpayer-funded service, surely the municipality could do the same. The Second Circuit disagreed: "[T]o the extent that New York has abandoned the fireman's rule, it has done so through *statutes* that provide for *individual* rights for injuries sustained by public officials." *Id.* at *10.

However, "[t]he heart of the [c]ounty's theory on appeal" was that the statutory nuisance law found in New York Public Health Law §1306(1) provided an exception to the free public services doctrine. *Id.* at *11–12. Specifically, the law states:

> The expense of suppression or removal of a nuisance or conditions detrimental to health shall be paid by the owner or occupant of the premises, or by the person who caused or maintained such nuisance or other matters, and the board of health of the municipality or county wherein the premises are located may maintain an action in the name of the municipality or county to recover such expense, and the same when recovered shall be paid to the treasurer of the municipality or county.

Id. at *12 (quoting New York Public Health Law §1306(1)).

According to the Erie County reading of the statute the county had two separate conditions upon which it could recover: nuisance or "conditions detrimental to health." Erie County argued that although the human remains from the crash may not have constituted a nuisance, they did constitute a condition detrimental to health. *Id.* at *15. However, under the rules of statutory construction in New York "words employed in a statute are construed in connection with, and their meaning is ascertained by reference to[,] the words and phrases with which they are associated." *Id.* at *15 (quoting N.Y. Stat. Law §239).

The section of New York Health Law article 13 entitled "Nuisances and Sanitation" appears to define nuisance clearly, and the definition is very limited. For example, titles under this article included the following subjects: "noxious weeds and growths," "tenement house sanitation," and "food handling." The Second Circuit noted that "although it may be possible for 'conditions detrimental to health' to exist absent a 'nuisance,' both terms refer to the same types of conditions and circumstances that are addressed by the concept of 'nuisance' under Article 13 of the New York Health Law." *Id.* at *16. In short, Erie County's attempt to separate "nuisance" from "conditions detrimental to health" failed, and the court did not accept the "[c]ounty's attempt to shoehorn the results of a catastrophic event into this limited category." *Id.* at *16.

The county's public nuisance argument failed as well. The federal district court noted that the county had "alleged neither a continuing nor recurrent problem, or [sic] that permanent damage from the crash required remediation beyond the clean up itself." *County of Erie*, 2012 U.S. Dist. Lexis 41254, at *14. The Second Circuit agreed: "Nuisance is a conscious and deliberate act involving the idea of continuity or recurrence." *County of Erie*, 2013 U.S. App. Lexis 4474, at *13 (quoting *State v. Long Island Lighting Co.*, 493 N.Y.S.2d 255, 258 (Nassau Cnty. Ct. 1985)). This catastrophe did not meet those qualifications.

The Second Circuit also cites a more pragmatic reason for rejecting the public nuisance argument. Private nuisances are by definition just that—private. When a government entity comes in and cleans up a private nuisance, it does something and pays for something that someone else should do and pay for. *Id.* at *14. Furthermore, as the court also mentioned in the decision, such nuisances are recurring or continuous conditions. *Id.* at *13–14. As the court noted, §1306 of New York Health Law allows reimbursement:

> [I]n the interest of public health and safety, the local government is performing not its own duty, but the duty of another. When the government responds to a catastrophic accident, however, it performs *its own duty* of responding to a discrete public emergency—not a duty on behalf of or in place of a third party.

County of Erie, 2013 U.S. App. Lexis 4474, at *14 (internal citation and quotation omitted).

While this case specifically concerns New York law, this is not a New York issue, and Erie County's nuisance argument is not unique.

Comparison

The federal district court's assertion that "public expenditures made in the performance of governmental functions are not recoverable" at first seems harsh. *County of Erie v. Colgan Air, Inc.*, 2012 U.S. Dist. Lexis 41254, at *5 (quoting *Koch*, 62 N.Y.2d at 560–61). However, other courts have ruled on this similar issue, and the case law is remarkably consistent.

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In fact, the Second Circuit cited the Ninth Circuit in *City of Flagstaff v. Atchison, Topeka and Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983). In that case, the City of Flagstaff responded to a train derailment in which the train was carrying four cars of liquefied petroleum gas. When Flagstaff attempted to recover its expenses, the court barred the recovery stating that "the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service." *Id.* at 323.

The *Flagstaff* court noted that the government may seek recovery when "the acts of a private party create a public nuisance which the government seeks to abate," such as removing toxins or other pollutants from drinking water, or when the government incurs expenses to protect its own property, such as fighting fires at a national forest. *Id.* at 324. However, after mentioning these examples, the Ninth Circuit pointed out that they did not involve the "normal provision of police, fire, and emergency services." *Id.* at 324.

The Ohio Supreme Court in *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d. 416 (Ohio 2002), adopted similar reasoning and a similar exception for nuisance. In *Cincinnati*, the City of Cincinnati filed a lawsuit against gun manufacturers that

> manufactured, marketed, and distributed their firearms in ways that ensure the widespread accessibility of the firearms to prohibited users, including children and criminals. Thus … due to their intentional and negligent conduct and their failure to make guns safer, [the gun manufacturers] have fostered the criminal misuse of firearms, helped sustain the illegal firearms market in Cincinnati, and have created a public nuisance.

Id. at 417.

The Ohio Supreme Court, citing *Flagstaff*, held:

> Although a municipality cannot reasonably expect to recover the costs of city services whenever a tortfeasor causes harm to the public, [the municipality] should be allowed to argue that it may recover such damages in this type of case. Unlike the train derailment that occurred in the *Flagstaff* case, which was a single, discrete incident requiring a single emergency response, the misconduct alleged in this case is *ongoing and persistent*. The *continuing nature* of the misconduct may justify the recoupment of such governmental costs… Moreover, even the *Flagstaff* court recognized that recovery by a governmental entity is allowed "where the acts of a private party create a public nuisance which the government seeks to abate" *Flagstaff*, 719 F.2d at 324.

95 Ohio St. 3d. at 428 (emphasis added).

The Second Circuit also cited a case involving the District of Columbia, which attempted to obtain reimbursement when it responded after an Air Florida flight crashed into the Potomac River after hitting a bridge. In that case, the U.S. Circuit Court of Appeals for the District of Columbia adopted both the rule and reasoning of *Flagstaff*:

> Where emergency services are provided by the government and the costs are spread by taxes, the tortfeasor does not anticipate a demand for reimbursement. Although settled expectations must sometimes be disregarded when new tort doctrines are needed to remedy an inequitable allocation of risks and costs, where a generally fair system of spreading the costs of accidents is already in effect—as it is here through assessing taxpayers the expense of emergency services—we do not find the argument for judicial adjustment of liabilities compelling.

District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1080 (D.C. Cir. 1984).

Conversely, the Seventh Circuit did allow reimbursement but did so relying upon a statute that permitted reimbursement. In *In re Oil Spill by The Amoco Cadiz*, 954 F.2d 1279 (7th Cir. Ill. 1992), a storm tore apart a crude-bearing ship off the coast of France causing a massive oil spill and extensive damage. *Id.* at 1285. The Seventh Circuit noted that Amoco, the owner of the ship, invoked

> [t]he principle of *gratuité des services publics,* known in the United States as the "free public services doctrine." In both [France and the United States], courts decline to require tortfeasors to compensate the government for the cost of services (such as police protection or firefighting) that a public body supplies."

Id. at 1310.

Amoco cited several cases including *District of Columbia*, 750 F.2d at 1077, 1080, and *Flagstaff*, 719 F.2d at 322.

However, the *Amoco* court noted that the principle of free public services doctrine applies "only when the legislature has been silent." 954 F.2d at 1311. The court then mentioned that in some cases such as oil spills cases, legislatures—most notably the U.S. Congress—expressly have allowed reimbursement. For example, "[t]he United States has reversed the rule in oil pollution cases by §311 of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1321(f)(1) (*Cf. Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.,* 944 F.2d 940 (D.C. Cir. 1991) (discussing damages for public cleanups under other statutes))." 954 F.2d at 1311.

The French, noted the *Amoco* court, had a similar statute known as Article 16 of the Law of July 7, 1976 which states:

> In the event of a failure or accident at sea occurring to any ship, aircraft, rig

or platform transporting or having on board harmful, dangerous substances or oil, and capable of causing serious and imminent danger likely to impair the coastline or allied interests as defined in article II-4 of the Brussels Convention of 29 November 1969 on intervention on the high seas in the event of an accident leading to or capable of leading to oil pollution, the owner of the said ship, aircraft, rig or platform may be served notice to take any and all measures necessary to bring an end to such dangers. In the event this notice has no effect or does not produce the effect expected within the deadline set forth or automatically in the event of an emergency, the State may order the necessary measures to be carried out at the expense of the owner or may collect an amount equal to the cost thereof from the said owner.

In re Oil Spill by The Amoco Cadiz, 954 F.2d at 1311.

Naturally, the parties in *Amoco* disagreed about what certain provisions of this law entailed. However, this was of little consequence. One of the parties was the French government, which was enough for the Seventh Circuit. The *Amoco* court held:

> [T]he Republic of France appears in this court and assures us that Article 16 applies to oil that reaches shore. The French State has taken this position since the moment it served the *mise en demeure* or notice in 1978, and it has reiterated the view in domestic disputes. The French State sought and obtained recovery under Art. 16 (as amended in 1983) in Case No. 511/88 (Tribunal de Grande Instance de Cherbourg, Sept. 3, 1990), in which the ship that released oil was flying the French flag. A court of the United States owes substantial deference to the construction France places on its domestic law. Courts of this nation routinely accept plausible constructions of laws by the agencies charged with administering them. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

In re Oil Spill by The Amoco Cadiz, 954 F.2d at 1312. In sum, the court held, "Article 16 suffice[d]…to authorize an award for the costs public agencies incurred in responding to the spill." *Id.* at 1313.

Some jurisdictions struggle with the free public services doctrine. *Compare Cherry Hill v. Conti Constr. Co.*, 218 N.J. Super. 348, 527 A.2d 921 (N.J. Super. Ct. App. Div. 1987), *with James v. Arms Technology, Inc.*, 359 N.J. Super. 291, 326 (N.J. Super. Ct. App. Div. 2003). In outlining some of the challenges with the rule, the *James* court quotes one commentator opining:

> [The rule] unjustifiably favors tortfeasors who harm government as compared to those who harm private parties. Second, it imposes the losses caused by this favored class of tortfeasors on taxpayers. In many instances, the doctrine lets industrial tortfeasors off the hook for forest fires, oil spills, and airline crashes and makes taxpayers pay the cleanup costs.

James, 359 N.J. Super at 327 (quoting Timothy D. Lytton, *Should Government Be Allowed to Recover the Costs of Public Services From Tortfeasors?: Tort Subsidies, the Limits of Loss Spreading, and the Free Public Services Doctrine*, 76 Tulane L. Rev. 727, 728 (2002)).

Practical Considerations and Conclusion

In closing the opinion the Second Circuit repeated its earlier statement noting that "public services provided in response to an emergency are just that—public services—and therefore are not subject to reimbursement." *County of Erie*, 2013 U.S. App. Lexis 4474, at *18. Significantly, in setting down the rule in *County of Erie*, the Second Circuit cited no statute. The decision was based entirely on common law as were the decisions in *Flagstaff, Cincinnati,* and *District of Columbia*. Without affirming legislation, municipalities cannot recover the funds spent on most emergencies. However, even as the courts have consistently held that a municipality cannot claim recovery, they have also consistently held that the remedy does not rest with the courts.

The Seventh Circuit noted that the free public services doctrine applies "only when the legislature has been silent." *In re Oil Spill by The Amoco Cadiz*, 954 F.2d at 1311. In *Flagstaff*, the Ninth Circuit noted that "[t]his is not to say that a governmental entity may never recover the cost of its services. Recovery is permitted where it is authorized by statute or regulation…or required to effect the intent of federal regulation." *Flagstaff*, 719 F.2d at 324.

The D.C. Circuit held:

> We are especially reluctant to reallocate risks where a governmental entity is the injured party. It is critically important to recognize that the government's decision to provide tax-supported services is a legislative policy determination. It is not the place of the courts to modify such decisions.

District of Columbia, 750 F.2d at 1080. The D.C. Circuit then aptly noted that "it is within the power of the government to protect itself from extraordinary emergency expenses by passing statutes or regulations that permit recovery from negligent parties." *Id.*

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The *Koch* court noted that "certain exceptions to the general rule have been created by statutory enactment to give a municipality a claim for expenditures for fire fighting and other police power services." *Koch*, 62 N.Y.2d at 561. The Second Circuit in *Erie County* essentially reiterated this in discussing the fireman's rule: "To the extent that New York has abandoned the fireman's rule, it has done so through *statutes*." *County of Erie*, 2013 U.S. App. Lexis 4474, at *10.

In short, the ability to recover is primarily a public policy consideration and the answer rests with the government branches that primarily decide public policy—the executive and legislative branches. If municipalities wish to recoup then municipalities must seek legislation affirming this remedy from the appropriate legislative bodies in their particular jurisdictions. Otherwise, a free public service is always going to be a free public service—even during a catastrophic event.